

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: June 11, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Salt Works Brewing Company, LLC
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Serial No. 86970058
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Francis John Ciaramella of Francis John Ciaramella, PLLC,
for Salt Works Brewing Company, LLC.

Sarah E. Steinpfad, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

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Before Cataldo, Heasley, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Salt Works Brewing Company, LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark SALT WORKS BREWING COMPANY (“BREWING COMPANY” disclaimed) for the following goods in International Class 32:¹

¹ Application Serial No. 86970058, filed on April 9, 2016, based on an allegation of a bona fide intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Beer; Beer, ale and lager; Beer, ale and porter; Beer, ale, lager, stout and porter; Beer, ale, lager, stout, porter, shandy; Beer-based cocktails; Beers; Brewed malt-based beers; Coffee-flavored beer; Flavored beers; Hop extracts for manufacturing beer; Malt beer; Malt liquor; Non-alcoholic beer; Pale beer; Porter; Processed hops for use in making beer; Root beer; Wheat beer.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the standard character mark SALTWORKS PROPERTY, registered on the Principal Register for "distilled spirits" in International Class 33.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. Applicant and the Examining Attorney filed briefs. For the reasons explained below, we affirm the refusal to register.³

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned

² Registration No. 5617827, registered on November 27, 2018.

³ The TTABVue and Trademark Status & Document Retrieval ("TSDR") citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .pdf version of the documents.

to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. Similarity of the Marks

We first consider the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 369 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126

USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019)).

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *In re i.am.symbolic*, 123 USPQ2d at 1748 (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on a comparison of the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). However, “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided

the ultimate conclusion rests on consideration of the marks in their entireties.” *In re Nat’l Data*, 224 USPQ at 751.

Applicant’s mark is SALT WORKS BREWING COMPANY in standard characters. The cited mark is SALTWORKS PROPERTY, also in standard characters. Given that both marks begin with the virtually identical wording, i.e., SALT WORKS and SALTWORKS, the marks are similar in sound, appearance, connotation and commercial impression. The fact that the initial wording in the cited mark appears as a single, compound term while the same wording appears as two words in Applicant’s mark is of no consequence. *See, e.g., Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (“[T]he marks ‘SEAGUARD’ and ‘SEA GUARD’ are, in contemplation of law, identical.”) (internal citation omitted); *In re Best W. Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (“There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical”); *Stock Pot, Inc., v. Stockpot Rest., Inc.*, 220 USPQ 52, 52 (TTAB 1983), *aff’d*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (“There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical.”).

Furthermore, it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered when making purchasing decisions. *Palm Bay Imps.*, 73 USPQ2d at 1692; *see also Presto Prods., v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). As such, consumers will focus more on the SALT WORKS portion of Applicant’s mark as the source-indicator for

Applicant's goods. This especially holds true since the inclusion of the descriptive and disclaimed wording BREWING COMPANY in Applicant's mark will not detract from the overall similarities between Applicant's mark and the cited mark SALTWORKS PROPERTY. Disclaimed matter that is descriptive of or generic for a party's goods or services is typically less significant or less dominant when comparing marks. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 1207.01(b)(viii) (October 2018).

Additionally, consumers who are familiar with Registrant's SALTWORKS PROPERTY distilled spirits and who then encounter Applicant's SALT WORKS BREWING COMPANY for various beer beverages may think Applicant's beers are a product line extension of Registrant's distilled spirits. *See, e.g., Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, *7 (TTAB 2019) ("ROAD WARRIOR looks, sounds, and conveys the impression of being a line extension of WARRIOR"); *Joel Gott Wines LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1433 (TTAB 2013) ("Purchasers of opposer's GOTT and JOEL GOTT wines are likely to assume that applicant's goods, sold under the mark GOTT LIGHT and design, are merely a line extension of goods emanating from opposer"); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (holding that VANTAGE TITAN for MRI diagnostic apparatus and TITAN for medical ultrasound device were confusingly similar and that the addition of applicant's "product mark," VANTAGE, to the registered mark

would not avoid confusion); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (“Those consumers who do recognize the differences in the [BRADOR and BRAS D’OR] marks may believe that applicant’s mark is a variation of opposer’s mark that opposer has adopted for use on a different product.”).

Challenging the refusal, Applicant argues that (1) the marks differ visually and aurally, (2) the marks, as actually used in commerce by the respective parties, connote a particular and distinct commercial impression, and (3) there is no evidence that the cited mark is famous or acquired secondary meaning within the marketplace or that consumers associate the term SALTWORKS with Registrant. Additionally, Applicant contends that because the USPTO has permitted numerous pairs of similar marks to register for different alcoholic beverages, there can be no likelihood of confusion between its mark and the cited mark. In support thereof, Applicant relies on copies of nineteen pairs of registered marks obtained from the USPTO database.⁴

We do not find Applicant’s arguments persuasive. First, while Applicant’s mark includes the term BREWING COMPANY and the cited mark includes the term PROPERTY, the marks are nonetheless similar in sound, appearance, connotation and commercial impression in that they both begin with the virtually identical dominant wording. Second, Applicant’s reliance on extrinsic evidence to demonstrate how the marks are actually used in commerce is misplaced. We must determine the question of likelihood of confusion based on the cited mark, as registered, and Applicant’s mark as it appears on the drawing page of the involved application, and

⁴ Applicant’s October 23, 2020 Request for Reconsideration, Exhibit D; TSDR pp. 31-132.

not on their manner of use based on extrinsic evidence. *In re Shell Oil*, 26 USPQ2d at 1690 n.4 (“Although Shell argues that its use of RIGHT-A-WAY would be in association with other Shell trademarks, the proposed registration is not so limited. Registrability is determined based on the description in the application, and restrictions on how the mark is used will not be inferred.”). Third, Applicant’s argument that the absence of fame of the Registrant’s mark should be treated as a factor in Applicant’s favor is untenable in an ex parte proceeding. The prior mark’s fame is generally considered only in the context of inter partes proceedings because, “in ex parte proceedings, the examining attorney is not expected to submit evidence regarding the fame of the cited mark...” TMEP § 1207.01(d)(ix). Accordingly, in an ex parte analysis of the *DuPont* factors for determining likelihood of confusion, the “fame of the mark” factor is normally treated as neutral when no evidence as to fame has been provided, as is the case here. *See In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1086-88 (TTAB 2016); *see also In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009) (noting that the absence of evidence as to the fame of the registered mark “is not particularly significant in the context of an ex parte proceeding”). Notwithstanding, we note that the cited mark issued on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Trademark Act. Thus, we find Registrant’s SALTWORKS PROPERTY mark, when viewed in its entirety, is inherently distinctive and, therefore, is entitled to the normal scope of protection accorded an inherently distinctive mark.

Finally, with regard to Applicant's third-party registration evidence, we initially note that none of the pairs of registered marks are for "distilled spirits" on the one hand, and "beer" on the other. Instead, they are for distilled spirits v. wine. Moreover, several of the pairs of registrations are for marks with differing commercial impressions, namely, RECIPE 21 v. CEPA 21; RUM DOG RUM v. FROSTY DOG; FIVE FARMS v. FIVE RIVERS; MONTANA 1889 WHISKEY v. 1859 CIDER COMPANY; and BLACK RABBIT v. CALIFORNIA RABBIT. Additionally, the marks in these pairs of third-party registrations are unlike the mark in the cited registration.

Further, we are unable to determine from the face of the registration certificates the contexts in which these third-party registrations were permitted. *See In re Nett Designs, Inc.*, 263 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to Nett Design's application, the PTO's allowance of such registrations does not bind the Board or this court."). For this reason, Applicant's third-party registration evidence is of limited utility. In this regard, prior decisions and actions of other examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the Board. *In re Midwest Gaming & Entm't*, 106 USPQ2d 1163, 1165 n.3 (TTAB 2013) (citing *In re Nett Designs, Inc.*, 57 USPQ2d at 1566); TMEP § 1207.01(d)(vi). It has been noted many times that each case is decided on its own facts, and each mark stands on its own merits. *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009).

Quite simply, the cited mark and Applicant's mark consist of virtually the identical dominant wording, i.e., "SALT WORKS" and "SALTWORKS". For the reasons discussed above, consumers are more likely to remember the term SALT WORKS than the other elements of Applicant's mark. *Nat'l Data*, 224 USPQ at 751. While we have not overlooked or discounted the disclaimed, descriptive wording BREWING COMPANY in Applicant's mark or the term PROPERTY in the cited mark, we nonetheless conclude that Applicant's SALT WORKS BREWING COMPANY and the cited mark SALTWORKS PROPERTY, when considered in their entirety, are substantially similar.

Thus, the first *DuPont* factor favors a finding of likelihood of confusion.

B. Relatedness of the Goods

The next step in our analysis is a comparison of the goods identified in Applicant's application vis-à-vis the goods identified in the cited registration, the second *DuPont* factor. See *Stone Lion Capital Partner, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computer Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); see also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). It is not necessary that the respective goods be identical or even competitive in order to find that they are related for purposes of our likelihood of confusion analysis. The respective goods need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that goods emanate from the same source." *Coach Servs.*, 101 USPQ2d at 1722

(quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *see also In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods and services are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or offered by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both Applicant's goods and the goods listed in the cited registration. *In re Davia*, 110 USPQ2d at 1817 (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). The issue is not whether purchasers would confuse the goods at issue, but rather whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

In support of her argument that Applicant's beer products and Registrant's distilled spirits are related, the Examining Attorney submitted Internet evidence showing twelve third parties offering for sale both beer and distilled spirits under the same mark.⁵

⁵ January 14, 2019 Office Action, TSDR pp. 6-11; November 13, 2020 Denial of Request for Reconsideration, TSDR pp. 4-18. The Examining Attorney also submitted evidence regarding a third party selling beer under the mark DELUXE and distilled spirits under the mark SINISTER. November 13, 2020 Denial of Request for Reconsideration; TSDR pp. 19-32. We note, however, that this evidence does not demonstrate that this particular third party offers **both** beer and distilled spirits under **each** of its DELUXE and SINISTER marks.

Applicant argues, however, that it does not sell distilled spirits under its proposed mark in International Class 33, but rather sells its beer products in International Class 32.⁶ Additionally, Applicant maintains that because there is no per se rule that holds that all alcoholic beverages are related, confusion is unlikely.⁷ Applicant relies on two unpublished Board decisions to support its argument, namely, *Patrón Spirits International AG v. Conyngham Brewing Company*, Opposition No. 91226939 (TTAB June 8, 2018) and *Chatam Internatioanl Inc. v. M Chapoutier*, Opposition No. 91228479 (TTAB Nov. 28, 2018).

Applicant's arguments are unavailing. First, the fact that Applicant's goods and Registrant's goods are in different International Classes does not establish that they are unrelated under Trademark Act Section 2(d). The determination concerning the proper classification of goods or services is a purely administrative determination unrelated to the determination of likelihood of confusion. *In re Detroit Athletic*, 128 USPQ2d at 1051 (citing *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993)). Rather, the way Applicant and Registrant have identified their goods controls. *See Nat'l Football League v. Jasper Alliance Corp.*, 16 USPQ2d 1212, 1216 & n.5 (TTAB 1990). Moreover, as previously noted, the issue is not whether purchasers would confuse Applicant's beer products and Registrant's distilled spirits, but rather whether there is a likelihood of confusion as to the source of these goods.

Accordingly, we do not find this evidence probative in our analysis regarding the relatedness of the goods.

⁶ Applicant's Appeal Brief, p. 8; 7 TTABVUE 9.

⁷ *Id.*

As to Applicant's reliance on prior unpublished Board decisions, we note that such unpublished decisions are not binding on the Board. *See In re Fiat Group Mktg. & Corp. Commc'ns S.p.A.*, 109 USPQ2d 1593, 1596 n.6 (TTAB 2014); *In re the Procter & Gamble Co.*, 105 USPQ2d 1119, 1121 (TTAB 2012); *In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1151 n.7 (TTAB 2011). Notwithstanding, neither of the unpublished Board decisions held that the alcoholic beverages at issue were per se unrelated. Instead, the Board found that the evidence of record submitted in each case was insufficient to demonstrate the relatedness of the alcoholic beverages at issue.

In contrast, the evidence of record submitted by the Examining Attorney in this proceeding demonstrates that Applicant's and Registrant's goods are related and are the types of goods that have been offered under a single mark by a single entity such that, when identified by similar marks, as is the case here, confusion as to source is likely. *Cf. In re Shell Oil.*, 26 USPQ2d at 1689 (“[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source.”).

This finding is consistent with precedent. Although we agree with Applicant that there is no per se rule that all alcoholic beverages are related, *see In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009), the Federal Circuit and the Board have previously found, on different records, that beer and distilled spirits are related goods for purposes of a Trademark Act Section 2(d) analysis. *See e.g., In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (beer

and tequila); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (Cognac brandy related to malt liquor, beer and ale).

Thus, the second *DuPont* factor also favors a finding of likelihood of confusion.

C. Similarity of Trade Channels/Classes of Purchasers

Next we consider established, likely-to-continue channels of trade, the third *DuPont* factor. Because there are no limitations or restrictions as to trade channels or classes of purchasers in the respective identifications of goods, we presume that the goods are or would be marketed in all normal trade channels for such goods and to all normal classes of purchasers of such goods. *See Packard Press Inc. v. Hewlett-Packard Co.*, 56 USPQ2d at 1357. The trade channels for both Applicant's and Registrant's goods would include liquor stores, bars and restaurants, and the alcoholic beverage sections of retail outlets. The relevant class of consumers for both goods includes connoisseurs as well as ordinary adult consumers who consume alcoholic beverages, or purchase different types of alcoholic beverages as gifts or to stock a bar at home. *See Somerset Distilling, Inc. v. Speymalt Whiskey Distribs. Ltd.*, 14 USPQ2d 1539, 1542 (TTAB 1989) ("While we realize that certain purchasers of alcoholic beverages may be aficionados and know not only 'their brands' but which companies make which trademarked products, we also realize that other consumers may not be as knowledgeable, and may purchase Scotch whisky, gin or vodka as gifts, or to stock a bar for their guests."). Accordingly, the trade channels and classes of consumers for the goods at issue, at a minimum, overlap.

Thus, the third *DuPont* factor also favors a finding of likelihood of confusion.

D. Consumer Sophistication

The fourth *DuPont* factor concerns the “conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Applicant argues that the purchasers of the parties’ goods are sophisticated and discriminating.⁸ Specifically, Applicant contends that because the goods at issue are relatively expensive, more care is taken and the relevant consumers are less likely to be confused as to source or affiliation.⁹

Applicant has not pointed us to any evidence supporting its argument that purchasers of distilled spirits or beer products are sophisticated and make purchasing decisions through careful consideration, or that the goods at issue are expensive. In fact, its argument is not plausible given the identifications of goods involved in this appeal. Because there are no restrictions as to purchasers or price point for the goods, we find that (1) the goods at issue include low-priced beer and distilled spirits, and (2) purchasers of distilled spirits or beer are adult members of the general public, who necessarily encompass both connoisseurs as well as ordinary adult consumers who consume alcoholic beverages and who may have limited or no discerning knowledge regarding the attributes of the alcoholic beverages they imbibe. Our decision must be based on the “least sophisticated purchasers,” *Stone Lion*, 110 USPQ2d at 1163.

⁸ Applicant’s Appeal Brief, pp. 8-9; 7 TTABVUE 9-10.

⁹ *Id.*

Notwithstanding, the evidence of record demonstrates that beer can be relatively inexpensive. For example, screenshots from the website www.maplewoodbrew.com shows that this entity sells four-packs of beer for \$10.¹⁰

For products that are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion increases because purchasers of these products are held to a lesser standard of purchasing care. *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (quoting *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000)). Casual purchasers of low-cost, every-day consumer items are generally more likely to be confused as to the source of the goods. *In re Davia*, 110 USPQ2d at 1818 (citing *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984)). Thus, contrary to Applicant's indications, the cost of the goods or any sophistication of the purchasers does not obviate any likelihood of confusion in this case, but seemingly increases the likelihood of confusion.

Even if some of the consumers of Applicant's or Registrant's goods are sophisticated, we point out that they may not be sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *See In re Shell Oil Co.*, 26 USPQ2d at 1690 (indicating that "even sophisticated purchasers can be confused by very similar marks"); *Top Tobacco, LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011); TMEP § 1207.01(d)(vii). And in the present circumstance, where the marks at issue are similar and the goods are related, confusion is often found

¹⁰ April 24, 2020 Final Office Action; TSDR pp. 83-84.

likely despite customer sophistication and care. “That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. ‘Human memories even of discriminating purchasers . . . are not infallible.’” *In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (quoting *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)); *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962) (“Being skilled in their own art does not necessarily preclude their mistaking one trademark for another when the marks are as similar as those here in issue, and cover merchandise in the same general field.”); *In re Wilson*, 57 USPQ2d 1863, 1865-66 (TTAB 2001) (where marks are very similar and goods related, confusion may be likely even among sophisticated purchasers).

Thus, this *DuPont* factor is neutral.

E. Nature and Extent of Any Actual Confusion/Length of Time During and Conditions Under Which There Has Been Concurrent Use Without Evidence of Actual Confusion.

The seventh *DuPont* factor considers the “nature and extent of any actual confusion.” *DuPont*, 177 USPQ at 567. The eighth *DuPont* factor contemplates the “length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *Id.*

The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by the Registrant under its respective mark. *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB

1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown Am. Enterps. Inc.*, 7 USPQ2d 1404, 1406-1407 (TTAB 1988); *Central Soya Co., Inc. v. North Am. Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) (“the absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring”).

Applicant points to the absence of evidence of actual confusion as weighing in its favor.¹¹ We do not accord significant weight to Applicant's contention, particularly given that there is no evidence of record as to the length of time Applicant has been using its mark, nor is there any evidence as to the amount and extent of Applicant's sales of Applicant's identified goods under its involved mark. Further, there is no evidence of record as to the scope and extent of Registrant's use of its respective mark.¹²

¹¹ Applicant's Appeal Brief, p. 11; 7 TTABVUE 12.

¹² Indeed, the lack of actual confusion in this case is particularly inapplicable because the application at issue is based on an intent to use and, as noted, Applicant has not shown that it has used its mark in the United States so there has been no opportunity for actual confusion to have occurred. Further, with regard to the cited mark, the allegation in a registration of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence. *See* Trademark Rule 2.122(b)(2); 37 C.F.R. § 2.122(b)(2).

Accordingly, while examples of actual confusion may point toward a finding of a likelihood of confusion, an absence of such evidence is not as compelling in support of a finding of no likelihood of confusion. *In re Opus One, Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001) (“The fact that an applicant in an ex parte case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred.”). Thus, we cannot conclude from the lack of instances of actual confusion that confusion is not likely to occur.

Therefore, the seventh and eighth *DuPont* factors are neutral.

F. Extent of Potential Confusion

Applicant also argues that the twelfth *DuPont* factor, the extent of potential confusion, i.e., whether de minimis or substantial, is also a relevant consideration. According to Applicant, any potential confusion would be de minimis, especially given that there have been no documented cases of actual confusion presented.¹³

We disagree. Because we have found that (1) the marks at issue are similar; (2) the parties’ respective goods are related; and (3) the parties’ respective goods are provided in the same or overlapping trade channels to the same or overlapping consumers, the potential for confusion is not de minimis.

Accordingly, this *DuPont* factor is also neutral.

¹³ Applicant’s Appeal Brief, pp. 10-11; 7 TTABVUE 11-12.

II. Conclusion

We have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. Because we have found that: (1) the marks are similar in appearance, connotation and commercial impression; and (2) Applicant's goods are related to Registrant's and move in the same or overlapping channels of trade to the same or overlapping classes of purchasers, we conclude that Applicant's mark, as used in connection with the goods identified in the application, so resembles the cited mark for the identified goods as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

Decision: The refusal to register Applicant's SALT WORKS BREWING COMPANY mark under Section 2(d) of the Trademark Act is affirmed.